72-360

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-360

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association; ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association; and LOCALS 829 and 858, I. L. A., Baltimore, Maryland, unincorporated associations,

Petitioners,

- versus -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,

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The petitioners International Longshoremen's Association (ILA), Atlantic Coast District, International Longshoremen's Association (ACD), Locals 829 and 858, I.L.A., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 3, 1972.

OPINION BELOW

The opinion of the District Court of Maryland is reported in 319 F.Supp. 737. The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 460 F.2d 497. Copies of the opinions of the District Court and the Court of Appeals for the Fourth Circuit are attached hereto as Appendices A and B, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 3, 1972. A petition for rehearing en banc was denied on June 2, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May the members of two Local unions, one predominantly black and the other predominantly white, all of whom work under the same collective bargaining agreement, doing the same work, for the same employers, at the same rates of pay and working conditions, invoke the protection of the First Amendment to the Constitution of the United States to maintain their right of free association as separate Locals, without governmental interference?

2. Do the provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000e, providing for equal employment opportunities, dictate a merger of two Local unions, one predominantly black and the other predominantly white, when the Local unions have not been found guilty of any discriminatory practices which would affect any person's right to equal employment opportunities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Code, Title 42

§ 2000e--2. Unlawful employment practices --Employer practices

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

STATEMENT OF THE CASE

The United States, without a complaint on anyone's part, instituted this proceeding under the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The ILA, ACD and Locals 829 and 858, all of which are unincorporated associations, were charged with having engaged in a pattern and practice of discrimination because of race.

The basis of the complaint was that by maintaining separate Locals, separate hiring halls and separate gangs on the basis of race or color, employers were caused to apportion work on the same basis and the result was that Negro longshoremen received less work and less desirable work than white longshoremen on account of their race.

ILA, ACD, Locals 829 and 858 all denied the charges of discrimination. Thereafter, pursuant to permission of the Court, an Amendment to the Answer was filed which alleged that any judgment requiring a merger of the two Locals, although opposed by the membership of said Locals, would constitute a violation of the First Amendment which grants to every person the right of freedom of association together with the alternative right of freedom to refrain

from association. The District Court granted a motion to strike the Amendment finding that the First Amendment's guarantee of freedom of association could not be asserted as a defense.

After a trial, the Court found that the evidence did not support the charges that Negroes had been deprived of employment opportunities as a result of any action of the ILA and/or the Locals or that the ILA and the Locals were responsible for Negro longshoremen working more so-called "dirty cargoes".

However, the Court determined that the maintenance of separate Locals would tend to deprive individual members of equal employment opportunities and that such maintenance of separate Locals was a per se violation of Section 703(c)(2) of the Act, 42 U.S.C. §2000e-2(c).

The Court granted the Government's request for injunctive relief which included the following:

(a) a merger of the hiring halls and adoption of an integrated seniority system;

(b) a requirement that Locals 829 and 858 be merged into one Local.

The ILA, ACD and Locals 829 and 858 did not oppose that portion of the decree requiring a merger of the hiring halls and the adoption of an integrated hiring system. However, an appeal was taken from the provisions of the decree requiring a merger of the Locals.

The Fourth Circuit Court of Appeals, by a divided court, affirmed the judgment of the District Court requiring the merger. In his dissent, Judge Bryan stated:

> "I do not join the majority in holding that locals 829 and 858 should be merged. I think all objection to their separate existence is removed by dissolution of separate hiring halls. A common source of labor controlled by an integrated hiring system means that there will be no inequality, based on race, in the opportunity for employment."

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW, DENYING THE PROTECTION OF THE FIRST AMENDMENT'S RIGHT OF FREEDOM OF ASSOCIATION, CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The District Court dismissed the defense of freedom of association, holding that it is not an independent right granted by the First Amendment but is available "only when the association is related to freedom of speech". The District Court also held that "The association of persons in a union is a grouping together for economic reasons and not for advancement of ideas or beliefs."

a) It has long been recognized that persons associating together for their economic welfare are protected in their right to associate by the umbrella of the First Amendment.

In McLaughlin v. Tilendis, 398 F.2d 287 (C.A.-7th Cir.), the Court of Appeals, reversed a District Court decision which had held that teachers who had joined a union had no First Amendment rights to join or form a labor union. The Court therein (p.288) stated:

"* * * Concluding that the First Amendment confers the right to form and join a labor union, we reverse on the ground that the complaint does state a claim under Section 1933." (emphasis supplied)

That Court thereafter cited numerous decisions of this Court supportive of its holding that freedom of association in unions is protected by the First Amendment.

The Court of Appeals citing Thomas v. Collins, 323 U.S. 516, stated:

"* * * Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment. Thomas v. Collins, 323 U.S. 516, 534. * * * "

b) The right of freedom of association extends to economic as well as political and social associations.

In Thomas v. Collins, supra, this Court said (pp.531-532):

"The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be

drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so. Nor, on the other hand, is the answer given, whether what is done is an exercise of those rights and the restriction a forbidden impairment, by ignoring the organization's economic function, because those interests of workingmen are involved or because they have the general liberties of the citizen, as appellant would do."

This Court also said in NAACP v. Alabama, 357 U.S. 459, 460-461:

"Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (emphasis supplied)

In Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, the issue before this Court was whether a labor organization could be enjoined from recommending attorneys to their members for the purpose of maintaining personal injury suits. This Court held that the First Amendment rights of free speech, petition and assembly were a bar to the injunctive relief.

In a later case involving the same question, United Transportation Union v. Michigan, 401 U.S. 576, this Court said (pp.579-580):

> "In affirming the trial court decree, the material part of which is set out below, the Michigan Supreme Court gave our holding in Trainmen the narrowest possible reading, focusing only on the specific literal language of the injunctive provisions rather than the broad range of union activities held to be protected by the First Amendment."

c) Freedom of association is an independent right under the First Amendment.

We respectfully submit that freedom of association under the First Amendment is a right, separate and distinct from the rights of speech, press and assembly and is to be equally protected.

This Court demonstrated the separability of the provisions of the First Amendment in NAACP v. Alabama, supra, (pp.460-461) when it expressed the freedoms of the First Amendment, in the alternative, stating:

> "* * * In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended may inevitably follow from varied forms of government action.* * * " (emphasis supplied)

In a recent decision in the District Court of Maryland, Bruns v. Pomerleau, 319 F.S. 58 (1970), the Court discussed the right of association and said (p.64):

> "The Supreme Court has left little doubt that the right of association is specifically encompassed and protected by the First Amendment. E.g., Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed 2d 480 (1960); NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). See generally, Emerson, Freedom of Association and

Freedom of Expression, 74 Yale L.J. 1 (1964). The First and Fourteenth Amendments protect this right to associate with any person of one's choosing for the purpose of advocating and promoting legitimate, albeit controversial, political, social or economic views. See Pollard v. Roberts, 283 F.Supp. 248 (E.D. Ark.), aff'd 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968)."

d) The Courts below, in denying the protection of the First Amendment's right of freedom of association to the two Locals involved, failed to recognize that unions are more than associations of workers concerned only with the economic welfare of their members.

Most unions, from the earliest days of the labor movement, until today, have been fraternal organizations with all that the term "fraternal" implies. While primarily economic, unions also are involved in social, political and cultural interests. The ILA's Constitution clearly sets this forth in its Objects and Purposes provision which reads as follows:

"The objects and purposes of the I.L.A. shall include the following: To promote the best interests of its members and their families; to organ-

ize the unorganized workers and to unite within the I.L.A. all workers within its jurisdiction; to bargain collectively on behalf of all the workers within its jurisdiction, and to negotiate, make and administer collective agreements; to improve the wages and hours of work and to increase the job security and better the working and living conditions of all the workers employed within its jurisdiction; to secure and promote laws for the benefit of all workers within its jurisdiction and labor generally; to engage in political education and to foster civic interest among its members and labor generally; to engage in educational activities and to further educational opportunities of its members and their families; to promote health, welfare, pension, recreational and civic programs in the interests of its members and their families and the workers within its jurisdiction; to establish, maintain and operate clinics, hospitals, labor union halls and labor temples; to unite with other labor unions and other labor bodies; to assist charitable, religious and educational bodies and institutions; to instill the spirit of patriotism and devotion to country among its members and their families and within

the labor movement; to carry out and enforce the provisions of its Constitution; to publish newspapers, periodicals and other literature to aid in the carrying out of the foregoing objects and purposes; and to do all things necessary and proper, permitted by law, to carry out the foregoing objects and purposes."

Thus, the cultural, political or social interests of the black members of Local 858 may be different than the interests of the white members in Local 829. By maintaining their separate status as a Local, they can best promote those interests and views which they feel will be beneficial to them.

The right to maintain a separate identity was expressed by Mr. Justice Douglas in his dissenting opinion in Moose Lodge No. 107 v. Irvis, ____ U.S. ____, 3 L Ed 2d 627, 641, 92 S.Ct. _____, wherein he states:

"My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permits all white, all black,

all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." (emphasis supplied)

In this free nation we have predominantly black colleges and universities, e.g. Grambling College and Howard University, among others, a National Bar Association composed of black attorneys, and many other organizations composed of predominantly black persons. Their continued existence is protected from government interference in the First Amendment.

Unions, as well, fall within that prohibition against interference by the government except to the limited extent necessary to protect equal rights of others.

e) In protecting equal employment opportunities for some, it is incumbent upon the courts to fashion the relief necessary to obtain that result in a manner that does not interfere with the right of freedom of association for other

In Shelton v. Tucker, 364 U.S. 479, freedom of association was involved, and this Court stated at pp.488-489:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.
>
> In Lovell v. Griffin, 303 US 444, 82 L ed 949, 58 S Ct 666, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In Schneider v. Irvington, 308 US 147, 84 L ed 155, 60 S Ct. 146, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the Court noted that where legislative abridgment of 'fundamental personal rights and liberties' is

asserted, 'the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.' 308 US, at 161. In Cantwell v. Connecticut, 310 US 296, 84 L ed 1213, 60 S Ct 900, 128 ALR 1352, the Court said that '(c)onduct remains subject to regulation for the protection of society,' but pointed out that in each case 'the power to regulate must be so exercised and as not, in attaining a permissible end, unduly to infringe the protected freedom.' 310 US, at 304. Illustrations of the same constitutional principle are to be found in many other decisions of the Court, among them, Martin v. Struthers, 319 US 141, 87 L ed 1313, 63 S Ct 862, 882; Saia v. New York, 334 US 558, 92 L ed 1574, 68 S Ct 1148; and Kunz v New York, 340 US 290, 95 L ed 280, 71 S Ct 312." (emphasis supplied)

In Keyishian v. Board of Regents of New York, 385 U.S. 589, 609, the following language from Shelton v. Tucker, supra, was reiterated:

"The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

f) The Decree of the District Court requiring a single hiring hall and an integrated seniority system was sufficient to protect the equal employment opportunities of all persons.

All employees involved in this proceeding work under the same collective bargaining agreement for the same employers, do the same work and receive the same wages, welfare and pension benefits. The District Court found that the evidence did not support charges that Negroes had been deprived of employment opportunities as a result of any action of the ILA or the Locals or that they were responsible for Negroes doing more undesirable work. However, the Court found that separate Locals would tend to deprive members of equal employment opportunities and that the maintenance of separate Locals constituted a per se violation of the Act. The Decree required that all hiring be done under an integrated seniority plan from one hiring hall. That portion of the Decree was not opposed by any of the parties and we submit that such relief was sufficient to protect any possible inequality in employment opportunities

without the necessity of depriving the members of Locals 858 and 829 of their freedom of association.

2. THE ISSUE AS TO WHETHER THE MAINTENANCE OF SEPARATE LOCALS IS A "PER SE" VIOLATION OF THE ACT IS A MATTER OF FIRST IMPRESSION FOR THIS COURT AND OF VITAL IMPORTANCE TO, NOT ONLY THE APPROXIMATELY SIX THOUSAND MEMBERS OF THE LOCALS INVOLVED, BUT TO THOUSANDS OF OTHER PERSONS SIMILARLY SITUATED.

The finding that the maintenance of two Locals, one predominantly black and the other predominantly white, is a "per se" violation of the Act was based on precedents not applicable to the Local unions involved.

The District Court, in holding that the maintenance of separate Locals is a per se violation of the Act, relied on Brown v. Board of Education, 347 U.S. 483, and its progeny.

In the Brown v. Board case (p.494), the Court found that separating children from others of similar age and qualifications generated a feeling of inferiority as to their status in the community which would affect their hearts and minds. The rationale of that case and all those following is not applicable to the situation

involved herein.

We submit that the adverse psychological effect upon children subjected to segregated schools is irrelevant to the issues involved herein.

Separate Local unions do not involve children subject to psychological trauma, nor even involve adults who have been, or who are subject to discrimination.

The Government set out to prove that because of the fact that there were two Locals in the Port of Baltimore:

(a) "*** Negroes work less hours than whites.***"

(b) "*** the Negro has less opportunity in the Port of Baltimore for the better paying, higher paying jobs."

(c) "*** they have less opportunity for overtime work than white longshoremen. They have less opportunity for cleaner work. It is the Negroes who work the dirty work in the Port of Baltimore, and this is a condition of employment."

The Government failed to prove any of the foregoing allegations. The District

Court found:

"The Government contends that the evidence here establishes that Negro longshoremen uniformly work the so-called 'dirty' cargoes (fishmeal, ore and the like) while whites work the cleaner cargoes. It appears that although some white gangs do load and unload dirty cargoes, Negro gangs handle much more of this kind of work. However, the defendants cannot be held responsible for maintaining such a practice.[14] Longshoremen have the right to decline to work any job that is offered to them." (emphasis supplied)

14. The stevedoring companies have not been made parties to this action. Even if the companies were parties here and were ordered to hire white gangs to work dirty cargoes, the white gangs would still have the right to decline to do this work.

The Court also found:

"In claiming that Negroes have been deprived of employment opportunities as a result of pattern or practice

of discrimination undertaken by the defendants, the Government introduced evidence to show that white longshoremen have worked more hours than Negro longshoremen in recent years in the Port of Baltimore. However, the proof further shows that the principal reason for this disparity is that until recently only a few Negroes have been hired by the stevedoring companies as mechanics, gearmen and foremen.[17] Within the past few years, Local 858 has taken steps to rectify this imbalance by insisting that the companies hire more Negroes. The success of such efforts is indicated by the figures in evidence showing that the disparity in hours worked between white and Negro longshoremen has been decreasing materially in recent years. * * * " (emphasis supplied)

17. Defendants' statistics show that when the hours worked by gangs are totalled, the Local 858 gangs show considerably more hours worked than do the Local 829 gangs for each contract year. Plaintiff's figures, which are broken down by individual white and individual Negro longshoremen, show that whites worked on the average more per year. The difference

undoubtedly is made up by mechanics, gearmen and foremen who are not members of gangs but who are members of the Locals.

It is apparent from the foregoing findings that the fact that there were two separate Locals in the Port of Baltimore:

(a) Did not result in Negroes working less hours than whites;

(b) Did not result in less opportunity for Negroes to obtain the better paying, higher paying jobs;

(c) Did not cause the Negroes to do the dirty work in the Port of Baltimore;

(d) Did result in Negroes obtaining more jobs as mechanics, gearmen and foremen at the insistence of Local 858 (the predominantly black Local).

The officers and the members of Local 858 (the predominantly black Local on whose behalf this action was allegedly brought) have demonstrated their opposition to the merger. The Government, with its big brother

attitude ignored the desires of those for whose benefit the Act was enacted.

The District Court during the course of the trial permitted testimony as to the desires of those involved over the objections of the Government, the Court stating:

> "The Court: Well, the law may not demand that there be a merger. There may be many ways to work something out. Of course, we are looking at something that goes to the question of relief here, and certainly one of the things that the Court should consider in the question of relief is what the individual members desire.***"

The following is a portion of the testimony of a long-time black member of Local 858.

He first testified that he discussed the merger among most of the men on the waterfront, both white and colored and that:

> "Nobody, both black and white -- nobody wants a merger of the Locals on the waterfront."

The member's testimony as to why he opposed the merger gave eloquent expression to the reasons why there should be no merger:

"A. My reasons for opposing a merger at this time is because as of now we have established something that is being recognized all over the country. We have in the past been followers and not leaders. We have now achieved an identity that black is beautiful -- well, so is many other colors -- but this is something now that we have achieved. We have a Union, we have officers, we have assessments, we have a bank account that we have built ourself.

We have now, schools and colleges who come to our Union Hall to look at the black longshoremen. When he walked in there, what he sees belong to the black longshoremen. We are friends with our other Local but we now have something that we can call our own, and to merger the two Locals, we would have to give that up.

I have a son in college and he is proud of me -- at one time he said, 'Dad, I want to go to

college because I want to get a white-collar job,' and then all of a sudden he wants to drop out of school to come to the waterfront, because an image has been portrayed by the black longshoremen in being of his own. Not that we are angry with our other Union but we have now built something of our own that we want to maintain. We are respected by civic groups, political groups, everybody; and we did this ourselves, on our own. And we, and myself, wish to remain that way."

However, the District Court, on the basis of the cases cited in its opinion, felt compelled to order a merger.

We respectfully urge this Court to take cognizance of the distinctions between the facts herein, and every other case cited, or relied upon by the Government.

In every other case the Negroes were compelled to be separate and apart from the whites, either by law or by limitation as to the jobs they were eligible to hold. In the instant case, the Negroes and whites have been and are on an equal footing. As the Court found:

"Locals 829 and 858 are the general cargo locals for the Port of Baltimore. They work under the same collective bargaining agreement, for the same companies, on the same ships, and occasionally in the same hatches at the same times. It is undisputed therefore that the members of both Locals do the same kind of work. The parties to the collective bargaining agreement which covers longshoring operations in Baltimore are the ILA, the District, the Locals and the Steamship Trade Association of Baltimore (the "STA"). The Locals bargain collectively on behalf of all longshoremen in the jurisdiction, and under the terms of the collective bargaining agreement the Locals refer members to job opportunities through their hiring halls. * * * "

Rather than having any adverse effect on its members, the fact that there is a predominantly Negro Local in the Port of Baltimore inures to their benefit.

It guarantees them representation in collective bargaining negotiations.

It guarantees them representation at all conventions of the ILA.

It gives them the opportunity to participate in matters of primary concern to the Negro populace.

It provides them with their own leaders. The International Vice President and Chief Negotiator for the Port of Baltimore is William Haile, a Negro, and a member of Local 858. There are seven other Negro Vice Presidents in the ILA.

Thus, the Negroes in the ILA have something that Negroes and other minority groups everywhere have been seeking, identity and the right of self-determination.

The Act was enacted to provide for equal employment opportunities for all.

To hold that there is a per se violation of the Act in every instance where there are black and white Local unions engaged in the same work for the same employers, at the same pay, whether or not there be discrimination in employment opportunities does violence to the purposes of the Act and the Courts below were in error in so holding.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Counsel for Petitioners

August 29, 1972

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
Plaintiff	:	
v.	:	
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and LOCALS 829 and 858, I.L.A., Baltimore, Maryland,	:	Civil No. 20688-H
Defendants.	:	

Filed: December 3, 1970.

John N. Mitchell, Attorney General of the United States, Jerris Leonard, Assistant Attorney General, Andrew J. Ruzicho and John W. David, Washington, D. C., and George Beall, United States Attorney, Baltimore, Md., for plaintiffs.

APPENDIX A

Julius Miller, Thomas W. Gleason and Gleason and Miller, New York, N. Y., and O'Connor & Preston, Baltimore, Md., for defendants.

HARVEY, District Judge:

In this civil action, the United States (the "Government") is seeking injunctive relief against various labor organizations because of alleged violations of Title VII of the Civil Rights Act of 1964 (the "Act"). Named as defendants are Locals 829 and 858 of the International Longshoremen's Association, as well as the International Longshoremen's Association itself (the "ILA") and the Atlantic Coast District of the ILA (the "District").

The Government claims that Locals 829 and 858 have violated and continue to violate § 703(c) of the Act, 42 U.S.C. §2000e-2(c), which provides as follows:

> "(c) It shall be an unlawful employment practice

APPENDIX A

for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race,

APPENDIX A

color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

It is alleged in the complaint that defendants have engaged in and are engaging in a pattern and practice of discrimination against persons on account of their race in the operation of their labor organizations in the State of Maryland. The Government seeks to enjoin the defendants from engaging in any employment practice which discriminates against any person on account of race. In particular, this Court is asked to enter a decree (1) merging Locals 829 and 858 into a single union; (2) requiring that these Locals operate a single hiring hall; and (3) requiring that the gang system for supplying longshoremen to employers in the Port of Baltimore be discontinued and that gangs as presently constituted be disbanded and reorganized on a non-racial basis.

APPENDIX A

The ILA itself and the District have been joined as parties because no merger of the two Locals would be possible in the absence of an order requiring appropriate action by the parent organizations as well.[1] The Executive Council of the ILA has the power under its constitution to issue and revoke charters of local unions and to order the consolidation of two or more locals. It is the responsibility of the District to recommend to the parent organization whether a local should be chartered.

The defendants assert that neither the two Locals nor the other defendants have violated the Act and fur-

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1. The defendant ILA is the parent organization which organizes and charters local unions engaged in the loading and unloading of ships in the United States and Canada, as well as local unions in related occupations. The defendant District is a division of the ILA with jurisdiction over local ports along the Atlantic Coast north of Cape Hatteras, North Carolina.

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ther take the position that if any violations have been proved, the Government's proposed relief is not feasible. The defendants have heretofore sought to file an amendment to their answer contending that a court-ordered merger of the two Locals would violate their members' right of freedom of association under the First Amendment to the United States Constitution. A motion to strike defendants' proposed amendment under Rule 12(f) of the Federal Rules of Civil Procedure has heretofore been granted by this Court after a hearing, on the ground that the defense raised by the amendment was insufficient as a matter of law.[2]

Facts

The parties have stipulated to most of the background facts, and numerous statistical exhibits were admitted in evidence at the trial without objection. Local 829 and Local

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2. An Order to this effect was entered by the Court in this case on July 31, 1970.

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858 represent longshoremen who load and unload ships in the Port of Baltimore. Local 829 was chartered in 1913 and from the time that it was formed has been composed almost entirely of white persons. At the present time there are approximately 1155 active members of Local 829, and since 1950 there have been about 4 Negro members. Since 1960, Local 829 has admitted to membership approximately 757 persons, all of whom have been white.

Local 858 was chartered in 1914. At all times since it was formed, Local 858 has been composed almost entirely of Negro persons. At the present time there are approximately 1226 active members of Local 858, of whom approximately 5 are white. Since 1964, Local 858 has admitted 263 members, all of whom were Negro except 2.

Locals 829 and 858 are the general cargo locals for the Port of Baltimore. They work under the same collective bargaining agreement, for the same companies, on the same ships, and occasionally in the same hatches at the same times. It is undisputed therefore that the members of both

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Locals do the same kind of work. The parties to the collective bargaining agreement which covers longshoring operations in Baltimore are the ILA, the District, the Locals and the Steamship Trade Association of Baltimore (the "STA"). The Locals bargain collectively on behalf of all longshoremen in the jurisdiction, and under the terms of the collective bargaining agreement the Locals refer members to job opportunities through their hiring halls. The STA represents all the stevedoring companies in the area who use the referral services of the hiring halls of the two Locals, and the STA is responsible for paying annual vacation benefits to the members of both local unions. A separate hiring hall is maintained by each Local.

In the Port of Baltimore, labor is supplied to stevedoring companies for the purpose of loading and unloading vessels in accordance with the so-called "gang system". Most ports along the Atlantic and Gulf Coasts use a similar system, although a few ports use a daily shape-up system based exclusively on seniority. Under the gang

system, the leader or gang carrier forms a group of some 15 t0 20 regular members. A normal gang consists of 8 men in the hold, 2 winch drivers, 4 deckmen, and a gang carrier. Gangs from both Locals 828 and 858 are referred to the stevedoring companies as a result of telephone calls to the hiring halls during the afternoon of the day before the men are needed for the work. Many gangs are assigned to particular employers and are regularly called by such employer when work is available. If more gangs are needed on a particular day in addition to those regularly assigned, the employer will specifically request another gang or will accept one from those available.

A new member of a Local first obtains work with a particular gang as an extra man or as a replacement whenever men are needed to increase the size of a gang or to fill a vacancy within the gang. When a regular vacancy occurs in a gang because of death, retirement or for any other reason, the gang carrier is the individual who selects the new member. A new member of a gang normally begins by performing less desirable work in the hold of a ship. There is an informal line of pro-

gression whereby such a member may work up to the more desirable top-side jobs. If a gang carrier leaves, the gang itself elects a new leader who is usually a member of the gang.

Local 828 supervises 30 gangs operating in the Port of Baltimore. All gangs under the supervision of Local 829 are composed solely of white longshoremen, with two exceptions. One of these gangs is composed solely of Negroes and includes members of both Local 829 and Local 858. One other is known as the "checkerboard" gang in that it includes members of both races from both locals. Local 858 has approximately 47 gangs operating in the Port, and all 47 are composed entirely of Negro longshoremen.

Most of the stevedoring companies in the City of Baltimore use both white and Negro gangs and use approximately as many Negro as white gangs.[3]

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3. For example, Jarka regularly employs seven gangs from Local 828 and seven from Local 858; Nacirema two from 829 and three from 858, and At-

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a few use only white or only Negro gangs.[4] There is no difference in skill and ability between white gangs and Negro gangs handling the same type of cargo.

Applicability of the Act

The Government seeks in this action to prove that Locals 829 and 858 have violated all three sub-sections of Section 703(c) of the Act. It is claimed that these two Locals have excluded from their membership individuals because of their race in violation of subsection (c)(1), that they have segregated or classified their membership in violation of subsection (c)(2), and that they have caused employers to discriminate against in-

lantic and Gulf five from 829 and four from 858.

4. For example, Rukert regularly employs three gangs from Local 858 and none from Local 829 while U. S. Lines regularly uses four from 829 and none from 858.

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dividual union members in violation of subsection (c) (3).

It is, of course, not necessary for this Court to find violations of all three of these subsections if the Government is to be entitled to relief. Only one need be proved. For the reasons stated herein, this Court finds from the evidence in this case that the defendant Locals have violated Section 703(c)(2) of the Act. It is therefore unnecessary to consider whether the facts further show violations of subsections (1) and (3).

It is clear from the stipulations and evidence that Locals 829 and 858 are segregated locals. Local 829 was chartered and has always been maintained as a white local with only a token number of Negro members. Since 1914 it has been known as the "white local", and most Negro longshoremen have therefore refrained from applying for membership to it.[5] Conversely,

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5. Before a Negro can join Local 829, it is necessary that he have a sponsor who is a member of that Local (viz.

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Local 858 was chartered as and has been maintained and known as a Negro local.[6] Only one of the 77 gangs operated under the supervision of these two Locals in the Port of Baltimore includes both white and Negro members of the gang.

This Court concludes that the maintenance of locals whose membership is segregated by race is a per se violation of Section 703(c)(2) of the Act. The defendants contend that the Government has not proved that segregation or

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a white sponsor). In 1967, 47 Negro and 15 white members of Local 1429, the freight handlers' Local in the Port, were required to transfer to either Local 829 or Local 858. All the Negroes transferred to Local 858 and all the whites transferred to Local 829.

6. Mr. Thomas W. Gleason, President of the ILA, testified by way of deposition that Negro locals were originally chartered by the ILA to protect Negro members so that they would receive a fair share of the work.

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racial classification of the membership of these two locals has deprived individuals of equal employment opportunities. But it is not necessary for the Court in this case to make specific findings to this effect under Section 703(c)(2). Subsection (c)(2) applies not only to the segregation or classification of the membership of a union which would deprive an individual of employment opportunities because of race but also to such segregation or classification which would "tend to deprive any individual of employment opportunities * * * because of such individual's race * * *." (Emphasis added).

The maintenance of separate locals for Negroes and whites performing the same duties in the same geographical area in itself would tend to deprive individual members of equal employment opportunities. As firmly established in Brown v. Board of Education, 347 U.S. 483, 494 (1954), the sanctioning of racially separate groupings in schools is inherently discriminatory, and this principle applies with equal force to cases such as the pending one where equal employment

opportunities are involved. The doctrine of "separate but equal" has long since been laid to rest in other areas. Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955), affirming 220 F.2d 386 (4th Cir. 1955), (racial segregation of public beaches and bathhouses); Johnson v. Virginia, 373 U.S. 61 (1963), separate seats in a courtroom); Christian v. Jamison, 303 F.2d 52 (5th Cir. 1962), (separate seating in public transportation); Turner v. Randolph, 195 F.Supp. 677 (W.D. Tenn.1961), (separate washrooms). No valid reason has been advanced by defendants for this doctrine's exhumation to justify the maintenance of racially segregated unions whose members work side by side as longshoremen.[7]

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7. In this case, some white and some negro longshoremen testified that they were opposed to the merger of their Locals. But nothing in the Act suggests that the maintenance of segregated locals tending to deprove individuals of employment opportunities is legally permissible merely because some union mem-

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In Hicks v. Crown Zellerbach Corporation, 310 F.Supp. 536 (E.D. La. 1970), the Court likewise found that the defendant International's maintenance of separate local unions for white and Negro employees was in violation of Section 703(c)(2) of the Act. In an earlier case in that District, the same judge reached the same conclusion as to the legality of segregated local unions in a case involving alleged violations of Section 703(a) of the Act. United States v. Local 189, United Paper Workers and Paper Makers, 301 F. Supp. 906 (E.D. La. 1969), affirmed 416 F.wd 980 (5th Cir. 1969).[8]

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bers of both races favor such segregation. See Cooper v. Aaron, 358 U.S. 1 (1958).

8. Furthermore, the National Labor Relations Board has held that the maintenance of separate segregated locals is grounds for de-certification. Pioneer Bus Company, Inc. and Transport Workers' Union, 140 N.L.R.B. 54 (1962); Hughes Tool Company, 147 N.L.R.B. 1573 (1964).

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For the reasons stated, this Court concludes that by segregating their membership by race, Locals 829 and 858 have violated Section 703(c)(2) of the Civil Rights Act of 1964 and that the Government is entitled to appropriate injunctive relief.

Injunctive Relief

More difficult than the question whether defendants have violated the Act in this case is that concerning the precise nature and extent of the relief to which the Government is entitled under Section 706(g) of the Act, 42 U.S.C. § 2000e - 5(g)[9]. To the extent that this Court finds present effects of past discrimination, it should promptly formulate effective affirmative injunctive relief.

9. Section 706(g) provides that a court may enjoin a defendant from engaging in an unlawful employment practice and may "order such affirmative action as may be appropriate * * *."

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United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970). Specifically, the Government has asked this Court to order the merging of the two Locals, to order that defendants maintain only a single hiring hall and to order the discontinuance in the Port of the present gang system for referring longshoremen to employers for work.[10]

In opposing the relief sought by the Government in this case, defendants contend that what the Government has proposed is not feasible in view of the facts and circumstances developed at the trial concerning longshoring operations in the Port of Baltimore. The Government concedes that appropriate injunctive relief must not only be designed to accomplish the objectives of the Act but must also be feasible insofar as the particular employment practice in the industry is concerned. The question of the feasibility of injunc-

10. Under the system proposed by the Government, the existing gangs would be disbanded, and a new gang would be "shaped-up" or formed each time a ship arrived in the Port for loading or unloading.

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tive relief under the Act was discussed by the Fifth Circuit Court of Appeals in that Court's opinion in Local 189, United Paper Makers and Paper Workers v. United States, 416 F.2d 980 (5th Cir. 1969). At page 989, the Court noted that when an employer or union has discriminated in the past, present policies which continue discriminatory effects must yield "unless there is an overriding legitimate, non-racial business purpose." At page 994, the Court further said the following:

> "When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination, unless the incidents are limited to those that safety and efficiency require."

In Quarles v. Philip Morris, Incorporated, 279 F.Supp. 505, 518 (E.D. Va. 1968), it was also noted that business necessity is a factor to be considered by the Court in a case of this sort.

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Considerations of safety and efficiency, as well as other non-racial business purposes, are therefore pertinent in this case. In deciding upon appropriate injunctive relief here, this Court is faced with a balancing process. On the one hand, the Court must consider the effects of the many years of racial segregation of the members of Locals 829 and 858, insofar as such practice has or may have tended to deprive individual union members of employment opportunities. Against these considerations must be weighed the effects that a decree reorganizing longshoring operations might have on the entire industry in the Port of Baltimore. Far-reaching relief which would adversely affect productivity and efficiency to such an extent as to discourage the use of the Port by shipping interests would reduce the availability of the very employment which is sought to be protected. What is required here is a decree which would eliminate, as far as possible, past discriminatory practices and yet would have a minimal adverse effect on normal and efficient longshoring operations in the Port.

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The defendants here contend that considerations of efficiency, productivity and safety should impel this Court to decline to grant any of the specific relief sought by the Government in this case. With reference to the merging of the Locals and the hiring halls, it is clear that the defendants' arguments are without merit. Indeed, the merging of these Locals and the maintenance of but one hiring hall would add to the efficiency of the procedures employed by both the union and the employers. No longer would it be necessary for employers to bargain with the officers and representatives of the two different locals. Nor would telephone calls have to be placed to two separate hiring halls to secure longshoremen to work a particular job. The testimony indicates that some employers purposely have attempted to hire as many Negroes as whites. With but one local charged with the duty of supplying longshoremen on a non-discriminatory basis, the stevedoring companies will not hereafter have to spend time and effort attempting to achieve a racial balance of their employees.

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The Order to be signed by this Court should therefore include provisions requiring the merger of Locals 829 and 858 into a single local, such merger to be accomplished in the manner and within the time fixed by the Order.[11] Whether one Local should be merged into the other as was required in Hicks v. Crowd Zellerbach Corporation, supra, or whether both should be merged into a newly created local will be left for further determination by the Court when a final Order is submitted. In addition, such Order should provide for the maintenance by the one remaining local of but a single hiring hall.

There is considerably more substance to the defendant's arguments that abolition of the gang system of hiring would not be feasible in the Port of Baltimore. Not only has the

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11. As there are almost as many active members of Local 829 as of Local 858, the merged local will have approximately as many Negro as white members.

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gang system been used in Baltimore for over 30 years, but it is also clear that most other large ports along the Atlantic Coast operate under a similar system.[12] The evidence discloses that a gang of longshoremen operates as a team. The skill and efficiency of a particular gang depends in large measure on the teamwork of its members, developed by working together over a period of years. As would be true if a football or other sports team adopted such a practice before every game, the complete reshuffling of the regular members of a gang and the daily replacement of such members with other individuals who had never previously worked together would quite clearly have an adverse effect on the performance of the gang as a whole.

The Government proposes that a daily shape-up be undertaken with gangs being organized each morning solely on the basis of seniority. The evidence in this case discloses that

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12. New York and Philadelphia operate under a gang system.

such a system would be inefficient, would increase safety hazards and would decrease the productivity of the workers. Almost all the experienced longshoremen who testified in this case, both white and Negro, opposed abolition of the gang system. Those few witnesses who supported the daily shape-up system were from other ports and were not generally familiar with the cargoes usually handled in Baltimore or with the conditions at this Port. In weighing the feasibility of the relief proposed by the Government against the degree of discrimination proved in this case, this Court finds that the disbanding of the existing gangs and the abolition of the gang system would not be appropriate relief here because it would decrease the efficiency of and create hazardous conditions for the work being performed by longshoremen in the Port of Baltimore.

The daily shape-up system has in general not been successful elsewhere and has undoubtedly contributed to higher accident rates in those few ports where it is used. Jacksonville, which has had a daily shape-up system for a number of years, has a much

higher accident rate than does Baltimore. Figures based on the number of accidents per one million man hours worked show Jacksonville's average for the past 4 years to be 91.8 as compared with 76.2 for Baltimore. The Negro President of a Jacksonville Negro local testified that members of his union had complained to him on many occasions about the hiring system in that port and that he favored a gang system. In particular, longshoremen in Jacksonville have complained about the amount of wasted time spent each morning attending the shape-up. A man is not paid until he actually starts work at 8:00 A.M. each morning. Yet he must report to the hiring hall around 6:30 A.M. and wait without compensation for the gangs to be formed.

Similar complaints have been voiced by longshoremen in Galveston, which adopted a daily shape-up system in 1966. In the past four years, Galveston has had one of the highest accident rates in the country, its average accident rate for that period being 118.1.

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In support of its position, the Government points to the Port of Houston which operates under a daily shape-up system, and the Government claims that the Houston figures show that a shape-up system can be as safe as a gang system. However, the evidence discloses that safer cargoes are handled at Houston than at Baltimore, including a much larger amount of grain, cotton and piece work and much less steel. Large tonnages of steel products are regularly loaded and unloaded in the Port of Baltimore, longshoring work which might be expected to result in more accidents than in Houston. Even though more dangerous cargoes are handled in Baltimore than in Houston, Baltimore's safety rate is actually slightly less than that of Houston, 76.2 as compared to 77.4, averaged over the past four years.

Witness after witness, notably those who regularly handle cargoes such as steel rails and other steel products requiring a high degree of cooperation between members of the gang, testified that they would not for safety reasons work as a part of a gang newly formed each morning for

each particular job.[13] In recent years, the productivity of longshoremen in the Port of Baltimore has increased while that of similar workers in other ports has gone down. From the evidence in this case, this Court finds that if the daily shape-up system were put into effect in Baltimore, the productivity of longshoremen in this Port would be adversely affected.

The Government contends that the evidence here establishes that Negro longshoremen uniformly work the so-called "dirty" cargoes (fishmeal, ore and the like) while whites work the cleaner cargoes. It appears that although some white gangs do load and unload dirty cargoes, Negro gangs handle much more of this kind of work. However the defendants cannot be held responsible for maintaining such a prac-

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13. The Negro President of Local 858 testified that the dismantling of existing gangs would "break up the Port."

tice.[14] Longshoremen have the right to decline to work any job that is offered to them. Top-skilled gangs in both Local 829 and Local 858 regularly refuse to work dirty cargoes. Some Negro gangs, regularly assigned to stevedoring companies which deal only in dirty cargoes, are willing to undertake this work. A daily shape-up would not necessarily result in more whites being assigned to this type of work, since whites would still retain the right to refuse a particular job as they have in the past and as have some Negroes also.

To hold that the gang system should not be discontinued is not to imply that in the future it should operate in all respects as it has in the past. On the contrary, important modifications are necessary if the pre-

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14. The stevedoring companies have not been made parties to this action. Even if the companies were parties here and were ordered to hire white gangs to work dirty cargoes, the white gangs would still have the right to decline to do this work.

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sent system is to operate in such a way that members of the merged local will not be denied equal employment opportunities. The decree in this case should require the defendants to take affirmation action to insure that the continued operation of the gang system does not deprive any such member of employment opportunities or limit such opportunities.

In particular, the new local should take steps to insure that available work is apportioned equally between existing white gangs and Negro gangs. Furthermore, when an extra man is needed or when an opening occurs in a particular gang because of sickness, retirement, death or for any other reason, such gang may not discriminate in selecting a replacement and may not choose a new white or Negro member merely because other members of the gang are white or Negro. It is clear that the present replacement policy, based as it has been on racial considerations, is discriminatory and unlawful. An opening in a gang should be filled either temporarily or permanently on the basis of seniority or other objective factors and not on the basis of

race. If union rules required that an opening in a gang should be offered to a qualified white or Negro longshoreman with the greatest seniority before being offered to a similarly qualified individual with lesser seniority, most of the existing gangs would before long have both Negro and white members.

To insure that equal employment opportunities are not denied to individual union members because of race, the new local should undertake to adopt a seniority system which is fair and objective as to all its members.[15] Following approval of a fair and objective seniority plan by union members, the new local should seek its implementation by means of collective bargaining with the STA and by inclusion of

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15. Indeed, the International has encouraged all its locals to adopt a seniority system. Furthermore, the evidence discloses that Locals 829 and 858 have already discussed a seniority system for inclusion in the collective bargaining agreement and are close to agreement on the details of such a system.

such a plan in the collective bargaining agreement.

In addition, the defendants should take affirmative steps to require that the stevedoring companies employ mechanics, gearmen and foremen on the basis of ability and seniority rather than because of race.[16] The evidence discloses that Negroes have been denied equal employment opportunities because qualified Negroes have not been employed by the stevedoring companies in these preferred capacities as often as whites. At the present time, there are about 70 gearmen and mechanics who are regularly employed by the stevedoring companies of which only about 10 are Negro members of Local 858. The defendants contend that such employment is undertaken directly by the companies and that the Locals have no control over whom the companies select. There is no apparent reason, however, why the new local cannot and

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16. These individuals are union members who are not members of gangs but who are usually full-time employees of the companies.

should not insist on a provision in its collective bargaining agreement requiring the companies to offer such employment to all union members qualified by experience for these preferred positions without regard to their race.

In claiming that Negroes have been deprived of employment opportunities as a result of a pattern or practice of discrimination undertaken by the defendants, the Government introduced evidence to show that white longshoremen have worked more hours than Negro longshoremen in recent years in the Port of Baltimore. However, the proof further shows that the principal reason for this disparity is that until recently only a few Negroes have been hired by the stevedoring companies as mechanics, gearmen and foremen.[17] Within the past few years, Local

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17. Defendants' statistics show that when the hours worked by gangs are totalled, the Local 858 gangs show considerably more hours worked than do the Local 829 gangs for each contract year. Plaintiff's figures, which are broken down by

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858 has taken steps to attempt to rectify this imbalance by insisting that the companies hire more Negroes. The success of such efforts is indicated by the figures in evidence showing that the disparity in hours worked between white and Negro longshoremen has been decreasing materially in recent years. In the contract year 1966-67, white longshoremen on the average worked 335 more hours per man than did Negro longshoremen. In the contract year 1967-68, this figure was 241 more hours; in 1968-69, it had dropped to 147 more hours and last year it was 120 more hours. With a merged local insisting that these preferred jobs be given to qualified Negroes as well as to qualified whites, presumably the disparity will soon be entirely eliminated.

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individual white and individual Negro longshoremen, show that whites worked on the average more per year. The difference undoubtedly is made up by the mechanics, gearmen and foremen who are not members of gangs but who are members of the Locals.

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For the reasons stated, this Court will not order that the gang system be discontinued in the Port of Baltimore. However, the decree to be entered in this case should require merger of the unions and the maintenance of but a single hiring hall. It should also contain provisions requiring modification of the gang system in the manner stated in this opinion. The decree should further provide that this Court will retain jurisdiction for the purpose of entering any additional order that is feasible and necessary to insure equal employment opportunities without regard to race for all members of the defendant unions in the Port of Baltimore.

This Court's findings of fact and conclusions of law under Rule 52 (a) of the Federal Rules of Civil Procedure are embodied in the foregoing opinion, whether or not expressly so characterized.

Counsel are directed to consult and thereafter prepare and submit to the Court an appropriate decree prepared in conformity with the findings

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and conclusions contained in this opinion. If necessary, a further hearing will be held concerning the form of such decree.

/s/ ALEXANDER HARVEY II
United States
District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 71-1367

UNITED STATES OF AMERICA, Appellee,

-v-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association, LOCALS 829 and 858, I.L.A., Baltimore, Maryland, unincorporated associations, Appellants.

No. 71-1386

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UNITED STATES OF AMERICA, Appellant,

-v-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, an unincorporated association, LOCALS 829 and 858, I.L.A., Baltimore, Maryland, unincorporated associations, Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

(Argued December 8, 1971
Decided May 3, 1972)

Before BOREMAN, Senior Circuit Judge, BRYAN and BUTZNER, Circuit Judges.

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Julius Miller (Gleason and Miller on brief) for International Longshoremen's Association, Atlantic Coast District, and Locals 829 and 858; John W. Davis, Attorney, Department of Justice (David L. Norman, Assistant Attorney General, David L. Rose, Attorney, Department of Justice, and George Beall, United States Attorney for the District of Maryland, on brief) for the United States of America.

BUTZNER, Circuit Judge:

This appeal and cross-appeal arise out of an action[1] brought by the Attorney General under Title VII of the Civil Rights Act of 1964[2] to combat ra-

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1. United States v. International Longshoremen's Ass'n, 319 F. Supp. 737 (D. Md. 1970).

2. 42 U.S.C. § 2000e-6(a)(1970), provides:

> "Whenever the Attorney General has reasonable

cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a perma-

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cial discrimination that limits employment opportunities for longshoremen in the Port of Baltimore. The district court ordered the International Longshoremen's Association, its Atlantic Coast District and two of its racially segregated locals[3] to operate a single hiring hall, to institute a non-discriminatory seniority system, and to fill permanent vacancies in longshoreman gangs on the basis of seniority instead of race. No party has assigned error to these provisions of the

> nent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

3. The International Longshoremen's Association, the Atlantic Coast District, and locals 829 and 858 sometimes will be referred to collectively as the union.

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court's decree, and they have been implemented pending this appeal.

The district court also ordered the merger of predominantly white local 829 with predominately black local 858. The ILA, the District, and the locals appeal from this order. Judge Boreman and Judge Butzner join in affirming the district court on this issue. Judge Bryan dissents.

The district court refused the government's request that racially segregated longshoreman gangs immediately be reorganized on a non-racial basis. Judge Boreman and Judge Bryan join in affirming the district court on this issue. Judge Butzner dissents.

The effect of this division in the court is to affirm the district court's order in its entirety.

I

MERGER OF THE LOCALS

Local 829 was chartered in 1913 and its membership always has been predominately white. The local has no

rule that excludes black workers, but an applicant must be sponsored by a member of the local and be approved by a majority of its membership. Moreover, a former president of the local, who held office after the enactment of the Civil Rights Act of 1964, told black applicants that they would have more opportunity to work if they joined the black local. Since 1960, all of the approximately 757 persons admitted to membership were white, and currently the local has only four black longshoremen among its membership of about 1,155.

Local 858 was chartered in 1914, and it has always been composed almost entirely of black persons. It also requires an applicant to be sponsored by a member and to be approved by a majority of its membership. Since 1964, it has admitted 261 black and two white persons. Currently there are only five white longshoremen in its membership of approximately 1,226.

Both locals are members of the ILA and its Atlantic Coast District. Both are parties to the same collective bargaining agreement and their

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members receive the same rate of pay. Both operate through a system of permanent gangs of 15 to 20 men. New members of the locals obtain work by filling temporary vacancies in a particular gang. When a permanent vacancy occurs, the gang leader selects a replacement who must be approved by other members of the gang. Gangs from both locals are assigned to ships in the Port when stevedores call the hiring halls to place job orders. When calling for gangs, the stevedores maintain a rough form of seniority based primarily on the status of the leader and the performance of his gang.

All members of local 858's gangs are black. All of 829's gangs consist of white longshoremen with two exceptions. This local has a checkerboard gang consisting of both black and white members, but black members of this gang work less desirable jobs. Another gang working out of the white local's hiring hall is composed solely of black longshoremen from both locals.

The evidence is undisputed that black and white gangs possess equal abilities and are capable of doing the

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same work. Gangs from both locals work for the same stevedores on the same ships and in the same hatches. Since there is no substantial difference in the locals except race, we conclude that the evidence fully substantiates the trial court's finding that the ILA chartered and maintains segregated locals in the Port of Baltimore. The presence of a few members of the opposite race in each local and the absence of racially restrictive by-laws do not invalidate the district judge's ruling.

Section 703(c)(2) of the Civil Rights Act of 1964 declares that it shall be an unlawful employment practice for a labor organization to segregate or classify its membership on the basis of race in any way which would "tend to deprive any individual of employment opportunities."[4] The

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4. Section 703(c)(2), 42 U.S.C. § 2000e-2(c)(2)(1970), provides:

> "It shall be an unlawful employment practice for a labor organization--

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district judge found that the maintance of the ILA's segregated locals is a per se violation of § 703(c)(2). He held:

> "The maintenance of separate locals for Negroes and whites per-
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> . . . .
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin. . . ."

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forming the same duties in the same geographical area in itself would tend to deprive individual members of equal employment opportunities. As firmly established in Brown v. Board of Education, 347 U.S. 483, 494 (1954), the sanctioning of racially separate groupings in schools is inherently discriminatory, and this principle applies with equal force to cases such as the pending one where equal employment opportunities are involved. The doctrine of 'separate but equal' has long since been laid to rest in other areas . . . No valid reason has been advanced by defendants for this doctrine's exhumation to justify the maintenance of racially segregated unions whose members work side by side as longshoremen." 319 F. Supp at 741.

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We agree with the district judge that the maintenance of racially segregated locals inevitably breeds discrimination that violates the Act. Racial segregation limits both black and white employees to advancement only within the confines of their races. The position that would rightfully be an employee's, but for his race, may be filled by a person of lower seniority or inferior capability because the job traditionally has been reserved for either a white person from one local or a black person from the other. Even though union officials strive in good faith to administer their duties impartially, they cannot avoid this inherent inequality, and its consequent violation of the Act. Indeed, so obvious is the discrimination that arises from segregated unions, in every case, save one, courts have ordered or approved mergers. United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), Musicians' Protective Union, Local 274 v. American Federation of Musicians, 329 F. Supp. 1226 (E.D. Pa. 1971); United States v. Chesapeake & Ohio Railway Co., 3 EPD ¶ 8331, at 7175 (E.D. Va. 1971); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314

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(E.D. La. 1970); United States v. Local 189, United Papermakers and Paperworkers, 301 F. Supp. 906 (E.D. La.), aff'd 416 F.2d 980 (5th Cir. 1969); Chicago Federation of Musicians, Local 10 v. American Federation of Musicians, 57 LRRM 2227 (N.D. Ill. 1964). Contra, United States v. International Longshoremen's Association, 334 F. Supp. 976 (S.D. Tex. 1971).

The wisdom of Judge Harvey's conclusion is illustrated by the record in this case. The evidence discloses that although there are more black gangs working in the Port than white gangs, black longshoremen work fewer hours than white longshoremen and on the average earn less money. Moreover, the black gangs traditionally work more of the "dirty" cargoes than their white counterparts.[5] The discrepancy in opportunities for work avail-

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5. These cargoes include fish meal, bone meal, feather meal, tapioca, ore, animal hides, roots, fertilizers, and loose material requiring shoveling and manual labor.

able to black and white longshoremen is due partly to the fact that most of the gearmen, mechanics, and foremen are members of the white local.[6] Since these men are not hired through the gang system, the defendants contend that the employers' preference for white workers in these classifications cannot be attributed to the union. These facts partially explain the discrimination against black longshoremen but they do not justify it. The record does not establish that black employees are unable to work satisfactorily as gearmen, mechanics, and foremen.

Abolition of the dual hiring halls and the other reforms decreed by the district court do not eliminate the necessity of merging the locals. The ILA's failure to secure equal em-

6. The district judge found that in the contract year 1966-67, white longshoremen on the average worked 335 more hours per man than did black longshoremen; in 1967-68, white longshoremen worked 241 more hours per man; in 1968-69, 147 more hours per man; and in 1969-70, 120 more hours per man.

ployment opportunities for its black members in all jobs for which they are qualified is an example of the inherent inequality that the district judge correctly concluded can be remedied only by a merger. Apart from further litigation, discrimination against black workers who aspire to non-gang jobs, such as gearmen, mechanics, and foremen, can only be accomplished by bargaining with the stevedores. But the officers of the white local owe no duty to the members of the black local, and it is unrealistic to expect them to participate in hard bargaining on behalf of black longshoremen. The president of the white local, while conceding that he knew members of his local worked 300,000 hours more than members of the black local in 1968, admitted he had done nothing to correct this disparity because it was "not within my power." At best, the union's committee[7] approaches the bargaining table

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7. The ILA, the District, and locals 829 and 858 are all parties to the collective bargaining agreement.

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with divided legal responsibilities and loyalties. However, merger of the locals will place on all bargaining representatives, not just black bargaining representatives, the statutory duty to eliminate racial discrimination throughout the Port. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 203 (1944).

The union's officers, including the black officers of local 858, oppose merger. Their principal argument against the district court's decree is the claim that merger of the locals infringes on the workers' rights to the freedom of association guaranteed them by the first amendment. This argument misapprehends the court's order. Merger will not prevent longshoremen from associating to achieve economic and political goals. The order does no more than prohibit exclusion from association on the ground of race. There is no warrant in the Constitution for a union to retain, even by majority preference, racially segregated locals that tend to deprive some black members of equal employment opportunities. The governing principles were stated by Mr. Justice Black when

the Court held that right-to-work laws did not deprive union members of the protection afforded by the first amendment:

> "There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards. a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies. The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assem-

> bly's plans. For where conduct affects the interests of other individuals and the general public, the legality of that conduct must be measured by whether the conduct conforms to valid law, even though the conduct is engaged in pursuant to plans of an assembly." Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525, 531 (1949).

The district court's order does not conflict with NAACP v. Alabama, 357 U.S. 449 (1958), and Thomas v. Collins, 323 U.S. 516 (1945), on which the union primarily relies. These cases do not create a right in white men or black men to avoid association with persons of the other race. On the contrary, they are leading authorities charting the right of all persons to associate for political and economic goals.

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II

THE GANG SYSTEM

The United States cross-appealed from that part of the district court's order that denied the government's request to desegregate the gangs by providing for a daily shape-up system, or, as an alternative, reformation of each permanent gang.[8]

The evidence discloses that segregation of the gangs accounts in part for the fact that individual black longshoremen work fewer hours and earn less than their white counterparts. The district court found that most stevedores employ approximately equal numbers of white and black gangs. Since the white local has 30 gangs and the black local 47 gangs, an approximately equal division of the work between the

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8. The government suggested the alternative remedy after the district court filed its opinion, and the court declined to reopen the case to consider it.

gangs along racial lines results in less work for black individuals. Cf. Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1013 (5th Cir. 1971); United States v. International Longshoremen's Association, 334 F.Supp. 976, 978 (S.D. Tdx. 1971).

There is another way in which the union sponsored segregated gang systems hampers equal employment opportunities. Many of the longshoremen in both locals are not attached to permanent gangs. They fill temporary vacancies from day to day. But progress toward better jobs within a gang, vacation benefits, and pensions depend to a large extent on working regularly in a permanent gang. Therefore, assignment to gangs according to race, instead of seniority and ability, has a lasting discriminatory effect beyond the weekly wages that a longshoreman earns.

The district judge recognized that segregation of the gangs contributed to unequal employment opportunities and for that reason he ordered that permanent vacancies in the segregated gangs be filled by recourse to seniority instead of race. This was

a commendable step, but the government questions whether it will prove sufficient to remedy the deep-seated racial inequality that exists in the Port, and the union offers no realistic estimate of the time required for this reform to desegregate the gangs.

The district court based its refusal to order the shape-up on two grounds. First, it decided that the relief it provided was sufficient to remedy the violations of the Act. Secondly, the court held that it must balance the Act's prohibition against racial discrimination with the business purpose of the gang system. Considering the evidence in this light, it concluded that the change to a daily shape-up "would decrease the efficiency of and create hazardous conditions for the work being performed by longshoremen in the Port of Baltimore." 319 F. Supp. at 744. In short, the court determined that business necessity justified the rentention of the gang system.

After the district judge wrote his opinion, four cases were decided which deal with the defense of business

necessity. In Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), Mr. Chief Justice Burger said:

> "What is required by Congress is the removal of artifical, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
>
> . . . The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

We dealt with the business necessity test in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), where Judge Sobeloff wrote:

> "[T]he applicable test is not merely whe-

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ther there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necesary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

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Judge Feinberg, writing for the Second Circuit in United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971), stated a similar rule:

> "Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . .If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."

And recently the Fifth Circuit adopted a standard no less stringent. As Judge Dyer explained in United States v. Jacksonville Terminal Co., 451 F. 2d 418, 451 (5th Cir. 1971):

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> "[T]he Terminal was required to prove not only that the seniority systems and restrictions promote safe and efficient operation but also that they are essential to these goals."

There is no merit in the union's suggestion that the business necessity test restricts only employers and not unions. In the leading case on the subject, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), Judge Wisdom specifically applied the test to unions:

> "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." [Emphasis added.]

The daily shape-up proposed by the government would reduce racial dis-

crimination. It is used in other ports, and its introduction has been followed by a decline in accident rates.[9]

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9. Comparison of accident rates in various ports is difficult because of differences in the cargoes handled in each port. However, some rough estimate of the effect of changing from a gang system to a daily shape-up can be obtained by comparing the accident rate in a given port before and after a change in systems.

In 1965 Galveston's rate was 136.6 accidents per million man hours worked. In 1966 the Port changed to a daily shape-up system and the rate increased to 141.9. However, in subsequent years the rate decreased significantly under the shape-up system. In 1967 it was 126.4; 109.5 in 1968; and 94.5 in 1969.

The Houston accident rate for 1965 and 1966 under permanent gangs was 100.3 and 84.5, respectively. The daily shape-up system was instituted in 1967, and the accident rate declined to 74.6. In 1968

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A number of witnesses expressed the opinion that the daily shape-up is less efficient than a system of permanent gangs, but they furnished no objective production statistics to prove their thesis.

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it increased to 80.6; and in 1969 it decreased to 70.0.

In Jacksonville before adoption of the daily shape-up system the rate in 1965 was 89.6 and in 1966, 93.4. The daily shape-up was adopted in 1967, and the rate increased to 102.0. In 1968 it decreased to 92.0, and in 1969 it decreased further to 79.6.

Thus, in three ports that recently changed from permanent gangs to the daily shape-up, the accident rate in 1969 was lower than it had been in the last year that the ports operated under permanent gangs. Of course, the shape-up cannot be isolated as the only reason for the decline in accident rates. Other undisclosed factors may have played an important role.

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Speaking for myself, and not for my brothers, I conclude that the union has not borne the burden of proof required by recently decided cases that deal with the business necessity test. Undoubtedly the present system promotes "safe and efficient operation,"[10] but I find in the evidence no "overriding legitimate business purpose"[11] necessary for safety and efficiency that justifies retention of the segregated gangs. Other ports in this country function without using the Baltimore system.

Therefore, I would remand the case for further proceedings. Almost a year has passed since the reforms ordered by the district judge were instituted. If his decree has eliminated segregated gangs and equalized the work and wages of similarly qualified black and white longshoremen, no further re-

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10. United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971).

11. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

lief will be necessary. But if racial discrimination still adversely affects black longshoremen, I would require reconsideration of the remedies proposed by the government and consideration of other remedies the union or the stevedores may wish to suggest. The district court should seek "a reasonably available alternative system with less discriminatory effects" to serve the "legitimate ends of safety and efficiency."[12] The court need not limit relief to the imposition of the daily shape-up. The system of permanent gangs has many advantages, and it is not inherently discriminatory. Only when the gangs are organized along racial lines is the Act violated. Therefore, I would not require the discontinuation of permanent gangs if they can be reorganized so that all longshoremen have equal employment opportunities.

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12. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); see also Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

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Since neither of my brothers share my views about the merits of the government's cross-appeal, the judgment of the district court is affirmed in its entirety.

AFFIRMED.

BOREMAN, Senior Circuit Judge, concurring in part and stating his view, in which he is joined by Judge Bryan, with respect to "THE GANG SYSTEM";

I concur in that portion of Judge Butzner's opinion pertaining to the merger of Local Unions Nos. 829 and 858, the abolition of dual hiring halls, and the points discussed generally in his opinion under the heading "MERGER OF THE LOCALS."

I find myself in disagreement with part II of Judge Butzner's opinion under the heading "THE GANG SYSTEM" in which he would hold that District Judge Harvey erred in refusing to order the immediate desegregation of the established gangs of workers and in rejecting the Government's proposal to

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require the adoption of a daily shape-up system. I would affirm the district judge on this point and I am authorized by Judge Bryan to state that he shares my views in this connection and joins in such affirmance.

The opinion of the district court in United States v. International Longshoremen's Ass'n is reported at 319 F.Supp. 737 (D. Md. 1970). Under the heading Injunctive Relief, 319 F. Supp. 742, et seq., the court discussed at length the relief sought by the Government and the contentions advanced by the parties, pro and con. It is clear that the court was keenly aware that nonracial business purposes are dominant considerations along with others such as safety, efficiency, and productivity.

> ". . . In deciding upon appropriate injunctive relief here, this Court is faced with a balancing process. On the one hand the Court must consider the effects of many years of racial

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segregation of the members of Locals 829 and 858, insofar as such practice has or may have tended to deprive individual union members of employment opportunities. Against these considerations must be weighed the effects that a decree reorganizing longshoring operations might have on the entire industry in the Port of Baltimore. Far-reaching relief which would adversely affect productivity and efficiency to such an extent as to discourage the use of the Port by shipping interests would reduce the availability of the very employment which is sought to be protected. What is required here is a decree which would eliminate, as far as possible, past discriminatory practices and yet would have a minimal adverse effect on normal

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and efficient longshoring operations in the Port." 319 F. Supp. at 743.

In turning its attention to the Government's proposal that the gang system be abruptly abandoned and that a daily shape-up system be instituted the court analyzed the evidence and stated its findings and conclusion. The court compared the longshoring work at the Port of Baltimore and at other ports, New York, Philadelphia, Galveston, Houston and Jacksonville, the nature of the cargoes handled at some of the various ports, the number of accidents per one million man hours worked, the favorable accident rate at Baltimore under the gang system where more dangerous cargoes are handled (large shipments of steel and steel products) as against the less favorable accident rate at other ports under the daily shape-up system where less dangerous cargoes are handled (grain, cotton, etc.). Based upon evidence discussed by the court, findings were made which are supported by the record. As noted, the few witnesses who favored the daily shape-up system were from other ports

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and were not generally familiar with the cargoes usually handled in Baltimore or the conditions at that port.

The court pointed out that a gang of longshoremen operates as a team; that the skill and efficiency of a particular gang depends in large measure on the teamwork of its members, developed by working together over a period of years; that the evidence discloses that a daily shape-up system would be inefficient, would increase safety hazards and would decrease productivity of the workers; that almost all of the experienced longshoremen who testified, both white and Negro, opposed abolition of the gang system; that the daily shape-up system in general has not been satisfactory elsewhere in those few ports where it is used; that in recent years the productivity of longshoremen in the Port of Baltimore has increased while that of similar workers in other ports where new gangs are formed each morning has decreased.

While refusing to order the immediate and abrupt abolition of the gang system the court indicated

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that important modifications are necessary:

> "To hold that the gang system should not be discontinued is not to imply that in the future it should operate in all respects as it has in the past. On the contrary, important modifications are necessary if the present system is to operate in such a way that members of the merged local will not be denied equal employment opportunities. The decree in this case should require the defendants to take affirmative action to insure that the continued operation of the gang system does not deprive any such member of employment opportunities or limit such opportunities.
>
> "In particular, the new local should

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take steps to insure that available work is apportioned equally between existing white and Negro gangs. Furthermore, when an extra man is needed or when an opening occurs in a particular gang because of sickness, retirement, death or for any other reason, such gang may not discriminate in selecting a replacement and may not choose a new white or Negro member merely because other members of the gang are white or Negro. It is clear that the present replacement policy, based as it has been on racial considerations, is discriminatory and unlawful. An opening in a gang should be filled either temporarily or permanently on the basis of seniority or other objective factors and not on the basis of race. If union

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rules required that an opening in a gang should be offered to a qualified white or Negro longshoreman with the greatest seniority before being offered to a similarly qualified individual with lesser seniority, most of the existing gangs would before long have both Negro and white members." 319 F.Supp. at 745, 746.

In footnote 9 of his opinion Judge Butzner undertakes a comparison of accident rates in various ports where the daily shape-up system has been in use in recent years and reaches the conclusion that the accident rate has been reduced. At the same time he recognizes that the shape-up cannot be isolated as the only reason for the decline in accident rates and that other undisclosed factors may have played an impor-tant role. But the district judge found from the evidence that the average accident rate for the last four years in each of the ports at Jacksonville, Galveston and Houston

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which have instituted the daily shape-up system is higher than the accident rate in Baltimore under the gang system even though more dangerous cargoes are handled in Baltimore. In fact, the court below pointed to Galveston as having one of the highest accident rates in the country, the average rate over the last four years being 118.1 per one million man hours worked as against the amazingly much lower rate of 76.2 over the same period in Baltimore.

The evidence disclosed also, as found by the court, that the longshoremen in Jacksonville and Galveston have complained about the amount of wasted time spent each morning attending the shape-up. A man is not paid until he actually starts work at 8 a.m. each morning, yet he must report to the hiring hall around 6:30 a.m. and wait without compensation "for the gangs to be formed."

The court noted the Government's claim of unequal employment opportunities in the past for the Negro longshoremen but he found a reason for the disparity and discussed the solu-

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tion to the problem and the anticipated total elimination of the disparity.

In its opinion the court observed that for the reasons stated the gang system would not be discontinued in the Port of Baltimore but that the decree entered should contain provisions requiring modification of the gang system in the manner stated in the opinion and should further provide that jurisdiction be retained by the court for the purpose of entering any additional order that is feasible and necessary to insure equal employment opportunities without regard to race for all members of the defendant unions in the Port of Baltimore. It is obvious that, by retaining jurisdiction, the court below was prepared to enter such orders as might be necessary if, after a trial period, it should appear that additional action is necessary to further implement the court's stated objectives. The decree providing for the retention of jurisdiction is most appropriate in the circumstances

Albert V. Bryan, Circuit Judge, dissenting:

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I do not join the majority in holding that locals 829 and 858 should be merged. I think all objection to their separate existence is removed by dissolution of separate hiring halls. A common source of labor controlled by an integrated hiring system means that there will be no inequality, based on race, in the opportunity for employment.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

JUN 2 - 1972

SAMUEL W. PHILLIPS
CLERK

No. 71-1367

United States of America — Appellee

-v-

International Longshoremen's Ass'n, etc., et al. — Appellants

ORDER DENYING REHEARING

Upon consideration of the petition for a rehearing, and of the suggestion for a rehearing en banc,

Now, therefore, with the concurrence and approval of the other members of the panel, no member of the court having requested a rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

John D. Butzner, Jr.
United States Circuit Judge

A True Copy, Test:

Samuel W. Phillips, Clerk

By Frances Stevens
Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-360

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 460 F. 2d 497. The opinion of the district court (Pet. App. A) is reported at 319 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1972. A petition for rehearing with sug-

gestion of rehearing *en banc* was denied on June 2, 1972. The petition for a writ of certiorari was filed on August 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the maintenance of local unions segregated on the basis of race violates Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, are set forth at page 4 of the petition.

STATEMENT

The Attorney General brought this suit pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, alleging that the defendants maintained in the Port of Baltimore labor unions, hiring halls, and work gangs which were segregated on the basis of race, and that such practices tended to deprive black longshoremen of equal employment opportunities.

The district court found that defendant Local 829 was established and is maintained as a white local, and defendant Local 858 was established and is maintained as a black local (Pet. App. A, pp. A-12 to A-13).[1] The court also found that defendants have

[1] The court found that there are only four blacks among the 1,155 members of Local 829, and only five whites in Local

maintained segregated hiring halls and work gangs (Pet. App. A, pp. A-8, A-10). It ruled that the maintenance of racially segregated unions necessarily violates Section 703(c)(2), because such segregation "tend[s] to deprive individual members of equal employment opportunities" (Pet. App. A, p. A-14).

In considering the appropriate relief, the district court found that black longshoremen have not been employed by the stevedoring companies in the preferred non-gang capacities of foreman, gearman, and mechanic, and that as recently as 1969-1970 members of the white local worked an average of 120 hours more per year than blacks (Pet. App. A, pp. A-31 to A-33). To remedy the violations of Title VII, the district court ordered that the segregated hiring halls be merged and that vacancies in the segregated work gangs be filled on a non-racial, seniority basis. The court also required the merger of Locals 829 and 858.

On appeal by the union and cross-appeal by the government, the court of appeals, by a divided vote, affirmed the judgment of the district court in all respects.[2] The court ruled that maintenance of segre-

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858's membership of 1,226 (Pet. App. A, p. A-7). It was undisputed that the members of both locals perform the same type of work (Pet. App. A, pp. A-7 to A-8).

[2] The government had cross-appealed from the district court's refusal to order immediate desegregation of the work gangs. The court of appeals held that such relief was not warranted at this time, noting that the district court had ordered certain reforms of the gang system and had retained jurisdiction to modify its decree "if, after a trial period, it should appear that additional action is necessary to further

gated locals "inevitably breeds discrimination that violates the Act," and even the good faith efforts of union officials "cannot avoid this inherent inequality" (Pet. App. B, p. A-47). For example, to eliminate the discrimination against blacks in the preferred non-gang jobs it is necessary to bargain with the stevedoring companies. "But the officers of the white local owe no duty to the members of the black local, and it is unrealistic to expect them to participate in hard bargaining on behalf of black longshoremen" (Pet. App. B, p. A-50). Merger would impose a duty on all bargaining representatives to seek elimination of racial discrimination (Pet. App. B, p. A-51).

ARGUMENT

The sole issue raised by this petition is the correctness of the rulings below requiring merger of the two segregated locals operating in the Port of Baltimore. Since this holding properly implements the statutory language and purpose and accords with the decision of the only other court of appeals that has ruled on the issue, review by this Court is not warranted.

1. Section 703(c)(2) of Title VII, 42 U.S.C. 2000e-2(c)(2), makes it unlawful for a labor organization "to limit, segregate, or classify its membership* * * in any way which would deprive or *tend to deprive* any individual of employment opportunities * * * because

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implement the court's stated objectives" (Pet. App. B, p. A-74). No issue with respect to the gang system is raised in this Court.

of such individual's race * * *" (emphasis added). Both the district court and the court of appeals found that the maintenance of local unions segregated on the basis of race inevitably tends to deprive individuals of equal employment opportunities. Since their jurisdiction coincides, the two locals compete for the same work opportunities, and the members of the local with less influence are necessarily disadvantaged. As the court of appeals stated, "Racial segregation limits both black and white employees to advancement [and employment opportunities] only within the confines of their races" (Pet. App. B, p. A-47).[3]

The only other court of appeals that has decided the issue also concluded for similar reasons that Title VII prohibits segregated locals; it ruled that the district court there had "erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act * * *." *United States* v. *Jacksonville Terminal Co.*, 451 F. 2d 418, 457 (C.A. 5), certiorari denied, 406 U.S. 906.[4]

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[3] The court of appeals also recounted the evidence showing that the black longshoremen here had in fact been deprived of equal employment opportunities (Pet. App. B, pp. A-48 to A-49).

[4] Several district courts have ordered mergers of segregated local unions. See *Musicians Protective Union Local 274* v. *American Federation of Musicians*, 329 F. Supp. 1226 (E.D. Pa.); *United States* v. *Chesapeake and Ohio Ry. Co.*, 3 EPD ¶ 8331 (E.D. Va.); *Hicks* v. *Crown Zellerbach Corp.*, 319 F. Supp. 314 (E.D. La.); *United States* v. *Local 189, United Papermakers*, 301 F. Supp. 906 (E.D. La.), affirmed, 416 F. 2d 980 (C.A. 5). In *United States* v. *International Longshoremen's Association*, 334 F. Supp. 976 (S.D. Tex.), the

2. Petitioners contend that the longshoremen's First Amendment right to freedom of association bars federal courts from securing equal employment opportunities for all union members by ordering the merger of segregated locals. But a labor union is not a private club; rather, as this Court has recognized, it is the representative of all those working under its jurisdiction and is "clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U.S. 192, 198. Accordingly, unions are subject to congressional regulation designed to protect the rights of all members and potential members and to ensure that persons are not denied membership or other benefits because of their race.

The cases relied on by petitioners are inapposite.[8]

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district court, while finding that segregated locals deprived blacks and Chicanos of equal employment opportunities, indicated a reluctance to order a merger. No final order has yet been entered in that case.

[8] As the court below stated (Pet. App. B, p. A-53):

> The district court's order does not conflict with NAACP v. Alabama, 357 U.S. 449 (1958), and Thomas v. Collins, 323 U.S. 516 (1945), on which the union primarily relies. These cases do not create a right in white men or black men to avoid association with persons of the other race. On the contrary, they are leading authorities charting the right of all persons to associate for political and economic goals.

Merger in this case does not deprive longshoremen of the right to associate for the advancement of political or economic ends; it simply ensures that this right will be made available to all on a non-racial basis. In similar circumstances this Court has held that right-to-work laws do not violate the First Amendment rights of union members:

> There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not participate in union assemblies. [*Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 531.]

Similarly, there cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their working conditions a right to exclude other workers from such assemblies on the basis of their race.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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